THE RECORD
OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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Association Activities

THE COMMITTEE on Federal Legislation, Arthur Newman, Chairman, and the Committee on International Law, John Duncan, Chairman, prepared a joint report on the 1956 version of the Bricker Amendment. The report has been distributed to the membership and to Congress.

A REPORT approving bills relating to the application by state prisoners to the federal courts for writs of habeas corpus (S. 1753 and H.R. 5649) has been distributed to Congress by the Committee on Federal Legislation, Arthur Newman, Chairman. Additional copies of the report are available upon application to the Executive Secretary.

THE COMMITTEE on Atomic Energy, Oscar Ruebhausen, Chairman, and the Section on Corporate Law Departments, E. Nobles Lowe, Chairman, sponsored jointly a panel discussion of the legal

aspects of atomic energy. The discussion was planned primarily for lawyers who had not worked on atomic energy matters.

ON JUNE 12, Milton Handler delivered his annual lecture on recent developments of the antitrust laws. The lecture was sponsored by the Section on Trade Regulation, John E. F. Wood, Chairman. Mr. Handler's lecture will be published in THE RECORD next fall.

THE COMMITTEE on Foreign Law, Willis L. M. Reese, Chairman, joined with the American Society of International Law in holding a meeting commemorating the 50th anniversary of the American Society of International Law. Otto C. Sommerich was chairman of the meeting. The speakers were Herman Phleger, Legal Adviser to the State Department, and Sir Lionel Heald, former Attorney-General of Great Britain.

UPON THE recommendation of the Committee on Uniform State Laws, William Curtis Pierce, Chairman, the Executive Committee has approved the Uniform Motor Vehicle Certificate of Title Act. This Act will be presented to the next session of the Legislature.

THE COMMITTEE on Trade Regulation and Trade-Marks, Laurence I. Wood, Chairman, has prepared a report on legislation (H.R. 9424) which provides for advance notice of mergers and which confers on the Federal Trade Commission power to apply for orders temporarily restraining mergers.

THE ANNUAL outing and dinner of the Committee on Criminal Courts, Arnold Bauman, Chairman, was held at the New York Athletic Club's summer home on Travers Island. The traditional

soft-ball game was this year between a team representing the Association and a team of judges captained by Supreme Court Justice James B. M. McNally.

As A result of action of the Board of Governors of the American Bar Association, on May 21 future membership application forms of the Association will omit any inquiry as to the race of the applicant.

"This question, which has appeared on the application form for many years, has had no bearing on eligibility for membership in the Association," it was explained by Joseph D. Stecher, Secretary of the Association. "The Board concluded that it serves no useful purpose."

CHIEF JUSTICE Robert Simmons of the Supreme Court of Nebraska, who had made several trips to the Orient, has asked THE RECORD to publicize his campaign for "Law Books for the Orient." A member desiring to contribute books to the campaign should write the Chief Justice at Lincoln, Nebraska, giving him a list of the books the member has available. The Chief Justice will then inform the member of the books that can be used. The donor then has the books packed in wooden boxes, and the United States Information Agency will pick up the books and ship them.

The Calendar of the Association for June

(As of June 12, 1956)

June 4 Dinner Meeting of Committee on Federal Legislation
Meeting of Committee on Membership Problems

June 5 Dinner Meeting of Committee on Admiralty

June 6 Meeting of Executive Committee

June 8 Luncheon Meeting of Special Committee to Study Defender Systems

June 9 Luncheon Meeting of Special Committee to Study Defender Systems

June 11 *Lecture on "The Organization and Work of International Aviation and Legal Committees" by Major K. M. Baumont, C.B.E., D.S.O., 8 P.M.* Sponsorship of Committee on Aeronautics
Dinner Meeting of Committee on Atomic Energy

June 12 Meeting of Section on Trade Regulation, 8 P.M.
Dinner Meeting of Committee on Trade Regulation and Trade Marks

June 20 Meeting of Committee on Admissions

June 21 *Adjourned Annual Meeting of Association, 5:00 P.M.*
Dinner Meeting of Committee on the Administration of Justice
Meeting of Committee on Medical Jurisprudence

June 25 Dinner Meeting of Committee on Anti-Trust Laws and Foreign Trade

The President's Letter

To the members of the Association:

This represents my first opportunity since being honored by election as President to report informally to the members of the Association. It is my intention to utilize each issue of THE RECORD for that purpose and thereby to convey some better appreciation of the wide range of useful, constructive, careful work which is constantly on the committee production line.

Since May eight I have been overwhelmed by literally hundreds of messages of good will which have moved me to an even greater appreciation of the significance of the responsibility which is mine and to which I shall devote my heart and mind.

I am now in the midst of talking with the chairman of each committee to work out the appointments for the current year. This is an eye-opening experience because in no other way can one realize the impressive range of the work of the Association or the interest, concern and pride each committee lavishes on its field of endeavor. Even more surprising to me has been the eagerness of the members for appointment to committees so that they may become active in the work of the Association. Truly this Association is a democratic institution in the best sense of the concept. We are all eternally indebted to the wise heads who prescribed the three year limitation on committee membership so that the work could rotate and no group or individual could obtain a vested committee interest.

It shall be my hope and endeavor to foster the participation of as many members as possible in the work of the Association, to make the atmosphere happy and pleasant and to let the general public know that the law is a profession in which all should take pride as one of the great constructive organized forces for the general good of City, State and Country. To that end I shall always welcome suggestions from any member as to how this great potential influence of the Association can be more effectively directed.

LOUIS M. LOEB

May 31, 1956

The Retiring President's Letter

To the members of the Association:

This is the end of two very exciting years for me. I hope that you feel that they have not been wasted years and that in some measure both the spirit and substance of this Association have been maintained. We have tried not to falter on the way but it has been no mean task to strive to live up to the standards of those that went before. In so far as we have failed, be assured that it is not the fault of our committees or our staff whose support and devotion to their tasks could not possibly have been more faithful. And I shall remain eternally grateful to you all for the never-failing loyalty and support which you have given me.

I have just returned from a visit to the West Coast where, among other things, I was asked to address the Bar Association of Los Angeles. They wanted especially to know about our activities here. I puzzled for some time as to how best to analyze them and sum them up. Finally I took as my text some words of Elihu Root, our former President, which were called to my attention by our inspired Executive Secretary and his Fellow. Mr. Root once said: "The lawyer has a duty to the law. * * * Not merely the fee and the triumph in the particular case, but the honor and dignity and service of the American Bar and the American courts must be the motives of thought and action among members of our profession."

It seems to me that through the work of and in this Association we strive to perform that duty. I think when you come to analyze it, you will find that our efforts to live up to this standard can be divided into four main categories, namely, our struggle to improve the quality of our judges, the quality of our lawyers, the quality of our laws, and for a better administration of the law. This is not the occasion on which to catalog our activities. To some considerable degree, it seems to me that our efforts succeed. To be sure we meet with failures and frustrations but the work goes on with unflagging zeal, the effort is continuously sustained, and I for one am confident that its influence and effectiveness

many times repays the effort. And we do our best to try to make it fun and not just drudgery. In this, I believe, we have really succeeded.

I was most gratified in my recent trip to California and also to Colorado, where I spoke to the Colorado Bar, to learn of the high honor and esteem in which our Association is held.

Now let me extend to you the most sincere congratulations on your selection of my successor. You could not have made a happier choice. He has already served this Association in important capacities with great devotion and effectiveness. I can assure you that he will carry on in the spirit of its highest tradition and will add great honor and distinction to your labors.

ALLEN T. KLOTS

May 8, 1956

Why Prosecutors Act Like Prosecutors

By Whitney North Seymour, Jr.

As one of those assistant district attorneys who is inclined to assert proprietary claims on the witnesses in a criminal case, I would like to add a few views from the other side of the fence to Newman Levy's *Some Comments on the Trial of a Criminal Case,* printed in the May 1955 issue of THE RECORD. Mr. Levy's excellent piece is replete with useful suggestions for a trial lawyer embarking on the defense of a criminal case, and should be re-read regularly. But it seemed to me that Mr. Levy's piece might be complemented by some comments on the preparation of a criminal case from the prosecution's point of view; which might also be helpful as an aid to brother lawyers preparing for trial, and serve as a partial apologia for why we prosecutors act the way we sometimes do.

SOME GENERAL OBSERVATIONS ABOUT PREPARATION FOR TRIAL

Mr. Levy says that a criminal case is essentially little different from trying a civil case. Alas, he speaks only from the point of view of the defense. His statement must be corrected to add that when you happen to be the party with the burden of proof in a criminal case (and also have to overcome the "reasonable doubt" and "presumption of innocence" at which Mr. Levy delights in hammering during his summations) you have a different problem entirely. Fortunately we prosecutors have tremendous resources in our investigative agencies and in our access to the grand jury.

Editor's Note: Whitney North Seymour, Jr., formerly a member of the Association's Entertainment Committee and Special Committee on a City and Municipal Court House, and a regular contributor to the Association's Art Exhibitions, is an Assistant United States Attorney for the Southern District of New York. This article is an expression of the personal views of the author and not an official statement of the United States Attorney's Office or of the Department of Justice.

But once we have rooted out the evidence through these devices our problem then becomes the mother hen's job of protecting our documents and witnesses from harm to make sure they will still be available as evidence when it comes time to go to trial.

Mr. Levy's article quite properly takes the view that the prosecutor should be held strictly to his burden of proof and that defense lawyers should be extremely cautious about making concessions, since "One never knows, under our adversary practice, what gaps or weaknesses may be revealed in the prosecution's case." Amen! These gaps and weaknesses are what haunt us prosecutors as we get our cases ready for trial. Patching the holes in the technical proof is frequently far more wearing than proving the substantive acts of the crime. Protecting the evidence from developing holes is what makes us prosecutors vindictive guardians of the government's case to begin with. So be understanding with us. And when you come into our offices with some innocent question about a case, do not be too surprised if we grab up all our papers and stare at you as if you should be indicted for obstruction of justice.

Try to place yourself in the prosecutor's shoes as you read what follows; you will find you do so with an increasingly sympathetic eye.

One comment: the following description of the prosecution's preparation for trial relates to experience in the United States Attorney's Office for the Southern District of New York, where the general procedure is that the Assistant to whom a case is first assigned carries it through all of its stages up to the Court of Appeals. The only time the Assistant is replaced, ordinarily, is when the case goes on to the Supreme Court, at which point the Solicitor General in Washington takes over. The practice in the County District Attorney's Office is quite different. There the Assistants specialize in handling some single phase of the cases as they come through the mill, such as preparation of indictments or handling arraignments. Because of this difference in procedure, many of these comments may be inapplicable to state court practice.

BEFORE THE INDICTMENT IS FILED

The federal courts have jurisdiction over a surprising number of crimes. Principal among these are narcotics violations, Internal Revenue cases, mail frauds and thefts, counterfeiting, check forgery, hijacking, and interstate transportation of stolen motor vehicles. Other frequent violations include bankruptcy frauds, crimes under the banking laws, violations of the Anti-Racketeering Act, smuggling and illegal entry into the country. The U. S. Courts also see a modest parade of cases involving violations of the Food, Drug and Cosmetic Act, illegal wearing of military uniforms, violations of the Securities Exchange and the Selective Service Acts, a small amount of white slave traffic, and other more obscure violations.

The work of the United States Attorney's office in preparing for trial in any of these cases begins when the case first comes through the door. Almost invariably, cases are referred to the office by the investigative agency having jurisdiction over the offense involved. These agencies include the F.B.I., the Secret Service, the Post Office Inspectors, the Bureau of Narcotics, the Immigration and Naturalization Service, Investigators from the State Department, the Alcohol and Tobacco Unit, the Intelligence Unit of the Bureau of Internal Revenue, and several others. Sometimes these matters are funneled to the U. S. Attorney's office through the Department of Justice in Washington; more often they are referred to our office directly from the agency. The principal exception to this procedure stems from the related violations arising out of cases and investigations already in the office, largely in the form of perjury before the Grand Jury or at trial. There are a few other forms of presentation, such as contempt citations referred to us by a house of Congress, but these are rare.

At the time a case is first presented to our office, we have the responsibility of deciding whether to accept prosecution or to decline. The decision not to prosecute is usually based on one of two grounds. The first, and most usual, is that the facts referred to us by the investigative agency do not constitute a crime under any

federal statute, often because some essential element of the offense is missing. The other usual ground is that although it is clear that an actual violation of the law has taken place, exhaustive investigation has failed to turn up sufficient evidence to prove one or more elements of the crime beyond a reasonable doubt.

Once the decision is made to accept prosecution in any case, the U. S. Attorney's office takes its very first steps in preparation for trial. These steps consist of an analysis of the facts developed by the investigative agency and decision as to what, if any, further investigation must be made before the matter is presented to the Grand Jury for indictment. Where the offense consists principally of some single act, such as theft, extortion, kidnapping, interstate transportation of a stolen motor vehicle, or the like, the case often is referred to our office immediately after the basic facts of the offense are learned, in order to facilitate a prompt arrest. Thereafter, investigation continues to develop the facts fully before the Grand Jury presentation. In other cases, such as mail fraud, income tax violations and elaborate matters of that kind, the investigation is usually complete by the time the matter is referred to us for prosecution.

Continued investigation under our direction, once a matter has been referred to our office, will be conducted either by the agents assigned to the case or through examination of witnesses before the Grand Jury. Frequently, both devices are used. Whatever the procedure, the object is to develop all of the basic evidence relating to the violation while it is still fresh, including the taking of statements from principal witnesses and obtaining documentary proof that might otherwise become lost or destroyed.

When this basic investigative stage is finished, the matter is then ready for the Grand Jury presentation and indictment, and the preliminary stage of preparation for trial is completed.

THE WAITING GAME BEFORE ACTUAL PREPARATION FOR TRIAL

In most cases there is a lengthy pause between the time of indictment and the time of the next stage of trial preparation.

There are two reasons for this. One is that it takes a long time to prepare a case for trial (the rule of thumb is three days of preparation for every day in court) and the U. S. Attorney's office suffers from the same chronic lack of personnel as most other government agencies. The other principal reason for the delay is that it usually takes a long time before the government is sure that a defendant actually intends to go to trial.

The overwhelming bulk of the criminal cases in the Southern District are disposed of on pleas of guilty. In contrast to this, the bulk of initial pleas at the time of arraignment are "not guilty." The reasons for this are many. Often defense counsel will have been retained only a day or two previous and will not have had a chance to familiarize himself with the details of the case in order to be able to advise his client properly as to a possible guilty plea. Also, a client may not have paid the agreed fee at this point and the plea of not guilty will serve to afford sufficient time to permit him to get his fee together. In other cases, a plea of guilty may be contemplated, but the defendant's lawyer wants to have his client sentenced by a judge whom he believes will be more sympathetic than the one presently sitting in the calendar part. There is sometimes yet another reason for the not guilty plea, and that reason is simply for delay, to put off the evil day of reckoning as long as possible.

When the defendant's lawyer has familiarized himself with the facts of the case, has made arrangements for his fee, believes that the sitting judge will not be too harsh, or what have you, the pleas of "not guilty" begin to be withdrawn and pleas of "guilty" entered. Notwithstanding these dispositions, a substantial number of cases continue to be carried on the trial calendar. These consist of the cases in which a defendant really intends to stand trial and those in which he says he does, purely for delay. After these cases have been carried long enough to accommodate the other reasons for pleas of not guilty, our office begins to press for actual trial.

As more and more steps in trial preparation are taken, the cases held on the trial calendar purely for delay begin to fold. Often

this does not happen until the actual day of trial, when counsel sees that there is no hope of a further delay. A plea of guilty at this stage often involves a great imposition on the government, because one of our Assistants will have been unnecessarily tied up preparing the case and a substantial amount of government time and money will have gone into assembling witnesses and exhibits. Fortunately, the judges often take this factor into consideration at the time of sentence, which tends to discourage extremes in unjustified delay.

When all of these cases have been disposed of, the ones remaining on the calendar are at the point where they can be readied for trial. By this time defense counsel in each case will have made whatever discovery motions are available, such as a motion for a bill of particulars and for discovery and inspection, and the government, increasingly uneasy about inroads on the proof, will have resisted the motions as vigorously as possible. The waiting phase will have ended and the cases set for actual trial will be ready for fullscale trial preparation.

GETTING READY FOR THE COURTROOM

As the working stage of trial preparation begins, the criminal case changes from being simply a violation of law into a legal chess game where the witnesses are the pawns. The prosecutor must now get together that part of his evidence which will both be admissible to establish the basic fact of the violation, and will not be too vulnerable to diversionary attacks in the courtroom. This means he must interview every single witness face to face to learn the precise details of the transactions to which they will testify, and try to learn of the lines of cross-examination to which they may be exposed. This involves hard work, principally because of the type of witnesses involved in a criminal case.

There are two main classes of witnesses in criminal cases. One is the ordinary, law-abiding citizen who is a witness more or less by chance. This class includes bank tellers, Western Union employees, merchants, persons whose automobiles have been stolen

and others in similar everyday activities. The other category of witnesses includes those people who are themselves somehow involved in the actual commission of the criminal act itself. These witnesses include associates of the defendant and, as often as not, co-conspirators and co-defendants in the same case who have already pleaded guilty.

It is foolhardy to go to trial in a criminal case without having interviewed all of the government's witnesses in both classes beforehand. A perfectly sound case can be easily lost without such advance preparation.

As a general rule there are no stipulations of fact in a criminal trial. No defense counsel will concede the mailing and delivery of a letter, for example, as is often done in a civil case to simplify the proof. On the contrary, lawyers quite properly expect the government to meet its burden of proof by a careful detailed presentation of evidence relating to every step in the chain. Particularly does this include matters of technical proof which often can develop defects sufficient to defeat a criminal charge without meeting it on its merits.

Interviewing the formal witnesses required to introduce the necessary technical proof is no easy task. Most of these witnesses resent being summoned for an interview before trial. Some refer the matter to their own lawyers to enter into long and complex negotiations to set up an appointment. Others are late, forget appointments entirely, or leave their records at home when they do come. Vacations, illnesses and business trips all have to be reckoned with. But invariably the pre-trial interview proves to have been essential to be certain that the witness has the right records, that he remembers names and dates correctly, or that he actually is in a position to testify to the transaction in question from his own first-hand knowledge.

Often the technical proof in a federal case includes the use of documents, such as bank or business records. Almost without exception, every such document contains some mispost or mathematical error which has to be uncovered and investigated before introduction at trial. If this is not done, astute defense counsel

can raise hob with a formal witness by confronting him with some mistake in his records which he is not prepared to explain. If possible, you have to find out how every staple hole and pencil mark got on each item of documentary proof.

Until this stage of trial preparation, one can never know whether the witnesses who are themselves involved in some aspect of the commission of a crime will tell the truth in the courtroom. This means hours of work in screening witnesses to determine whether they should be allowed to take the stand. The hard fact is that a witness who is himself involved in a case is often inclined to lie. Even if he has given a signed statement to the investigators, he may deny its contents completely at trial. He may, on the other hand, in the hope of winning favor, try to elaborate on his earlier statement to make an even better story. Or he may be prepared to lie on some collateral issue about which he might be subject to cross-examination. Because of this inclination, the pre-trial interview of implicated witnesses is the most wearing part of trial preparation.

You cannot expect to have school teachers or clergymen as witnesses to the inside details of a crime. The only people who know these details are the people who themselves participated in the commission of the crime. As often as not, these are people with long criminal records. If the government is to prove its case, however, it usually has no choice but to call these witnesses to the stand. This is not easy.

It is a tough job to get a witness to talk in the first place. This is particularly true if the witness has no love for law and order. One reason a reluctant witness will agree to talk is that he is a co-defendant who has pleaded guilty and has not yet been sentenced, and hopes by his cooperation to get some consideration from the sentencing judge. Another possibility is that the witness himself has not been indicted by the Grand Jury because of his cooperation before them, and therefore hopes that he will never be indicted if he continues to cooperate.

Witnesses who want to avoid testifying have a number of courses open to them. One is to claim the Fifth Amendment. If a

reluctant witness tells the prosecutor ahead of time that he intends to claim his privilege on the stand, it is improper for the prosecutor to call him. If, on the other hand, a witness claims his privilege for the first time at trial, the present state of the law is so broad that a witness can usually hide behind the Fifth Amendment and avoid giving any testimony at all.

Another course for avoiding the stand is to lie. This may be done for any number of reasons. A witness may attempt to protect himself from possible prosecution by lying about his own participation in the case on trial. Frequently a witness is prepared to tell the truth about the matter on trial but will lie about some related activity in order to protect himself. Often witnesses will refuse to tell the truth out of fear of reprisals. We frequently have them weeping in our offices at a request to testify, because of fear of physical harm to themselves or their families. The ghost of Arnold Schuster still haunts the homes of witnesses who help the government.

As a result of these factors, many prospective witnesses are never called to the stand. The pre-trial interview may make it clear that some of them will not tell the truth. Others may be excused because their criminal records or demeanors are so bad that a jury could not be expected to believe them.

There comes a time after these preliminary interviews and decisions when all the documentary proof has finally been scrutinized, the formal witnesses interviewed face to face, and the substantive witnesses screened. At this point, after many days or weeks of work, the criminal case is at last ready to go into the courtroom.

SOME OF THE PROBLEMS OF TRIAL

Preparing a case for trial does not end at the courtroom door. The government's evidence is never secure until the jury starts its deliberations. Before that time all sorts of things can happen to change the nature of the proof. Witnesses get sick or disappear. A once-cooperatve witness suddenly turns hostile. Practical problems of convenience and timing arise in getting witnesses on the

stand, which affect the order of proof and in turn may require a complete replanning of the presentation of other evidence.

The greatest worry is that the principal witnesses will not hold up on the stand. Often they will have been subjected to threats or other pressures. Occasionally, roughnecks actually appear in the courtroom to stare down a witness in an attempt to rattle him.

Cross-examination can raise the dickens. Some unanticipated line of examination may open up where the government attorney does not know what the answers will be. The tricky question, involving a double meaning, is always a problem requiring that the prosecutor be on his toes to protect against the witness being misled or confused. Any cross-examiner can suggest the existence of other issues in a case just through the wording of his questions. This has to be dealt with on the spot.

Many times an issue of fact will arise during the presentation of proof which requires locating a new witness while the trial is actually in progress. This means organizing the search for the witness, arranging his appearance and trying to work in a short interview.

In addition, the prosecutor must have a line on everyone who knows anything at all about the case so that they may be produced in court in the event defense counsel takes the tack of accusing the government of concealing vital witnesses.

While all these things are going on, the prosecutor must keep a watchful eye on other aspects of the progress of the trial. He must jealously guard the sanctity of the jury against any possible sign of tampering. Any communication to a juror can only hurt the government's case by creating the basis for a mistrial or subsequent reversal. The prosecutor must be prepared to fight against rulings from the bench which may be harmful to the government's case. There is no appeal for the government from these rulings, and therefore if the government seeks to have them changed, it must do so by prompt and thorough legal research and argument during the trial itself. The prosecutor must also be vigilant against any possible reversible error which might sneak into the record. Not all error is resisted by defense counsel.

In fact, error is often encouraged by counsel as an anchor to leeward in the event of conviction, to provide a basis for a subsequent appeal.

After court is over for the day, arrangements must be made by the prosecutor for the appearance of witnesses, for their accommodation if necessary, for location of new witnesses whose appearance was not anticipated, or substitute witnesses for those who cannot attend. Meanwhile the prosecutor must also be collecting his thoughts to meet the myriad problems in the next day's proceedings. Trial preparation in the final stages does not end until the jury has finally retired to consider its verdict. At that point, thank heavens, nothing more can be done.

SOME COMMENTS ON THE PROSECUTOR'S ROLE AS AN ADVOCATE

One frequently hears the prosecutor referred to as a "quasi-judicial officer." This is essentially true. But the reference is usually made as a term of criticism thrown up during a trial when the prosecutor is fighting his hardest to protect the government's case. At this time most of the prosecutor's quasi-judicial functions have long since passed, and he is an eager lawyer trying to protect his client's interests. Well-intentioned attorneys and laymen sometimes misunderstand this spirit of advocacy on the part of the prosecutor, and urge that he should be acting with judicial calm in the courtroom rather than with a barrister's zeal.

The Canons of Professional Ethics define the prosecutor's job as follows: "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done." That is precisely the way we conceive our jobs. This definition principally comes into play, however, when a case is first brought in to the office and is being readied for Grand Jury presentation. This is where we exercise our judicial role in making our decision as to whether to prosecute or decline.

When we decide to prosecute, it is because we decide that this is how justice will be done. The decision is reached only after we

have satisfied ourselves of the defendant's actual guilt. When our belief in the defendant's guilt is fortified by the Grand Jury's decision that he be held for trial, we become fledgling advocates, and our judicial function is relinquished to the judges who will sit on the various stages of the case. Then as trial approaches and we see justice fighting a losing battle as the evidence is whittled away, we become more and more aggressive in our protection of the case that we believe to be right. Finally, at trial, when false issues are injected, unfair attacks are made on the witnesses, or perjured testimony is given by a defendant trying to lie his way out of a just conviction, the prosecutor becomes the most zealous champion of justice you can imagine. He is then a full-fledged fighting advocate; and he should be. He must act with candor and fairness, but he must also fight for his cause. To do otherwise would be to violate his duty in the most real sense. His job is now to fight fairly and firmly with all his might to see that truth and justice prevail.

Pre-Trial Procedures in the Federal Court

In January, the Committee on Post-Admission Legal Education, Orison S. Marden, Chairman, sponsored through its Section on Litigation, of which Edward C. McLean is Chairman, a forum on "Pre-Trial Procedures in the Federal Courts." In the April number of THE RECORD there were published the introductory remarks of Judge Irving R. Kaufman and Judge Harold R. Medina. Published here is the transcript of the pre-trial demonstration presided over by Judge Archie O. Dawson of the United States District Court for the Southern District. Emil K. Ellis acted as attorney for the plaintiff, and Edward B. Wallace represented the defendant.

PRE-TRIAL CONFERENCE

The Court: We are met here for pre-trial conference pursuant to the provision of Rule 15 of the Calendar Rules of this court. Counsel will realize that at the conclusion of this conference, a pre-trial order will be entered in accordance with Rule 18 of the Calendar Rules of this court. The purpose of the conference is, so far as we can, to simplify the issues, see what concessions of the facts can be obtained and what other steps can be taken to shorten the trial and to assist counsel in avoiding unnecessary expense and waste of time.

Let me ask you, so that I may be acquainted, Mr. Ellis, will you state in just a few simple words what is the nature of this action. What in general is the action about?

Mr. Ellis: This action is brought to recover for the services rendered to the defendant at its request, in connection with the formulation of a pension plan for the defendant. The defendant is a large manufacturer of farm equipment and has some 400,000 employees. In and about the month of May 1949, plaintiff, who had a very wide background in Wall Street, and was the author of various books and pamphlets on so-called dollar averaging and equity securities, was engaged by the defendant to formulate a pension plan to cover the hourly rate employees of the defendant. Up to that time only the salaried employees were covered by the pension plan.

The plaintiff prepared a number of charts and statistics and pamphlets showing the safety of investment of pension funds in so-called equity securities in contradistinction to the type of securities which had been used for investment purposes previously, and that is as used by insurance companies, who are limited to investment securities lawful for them.

The Court: And you claim, Mr. Ellis, the defendant adopted that plan?

Mr. Ellis: Yes, Sir.

The Court: Do you contend there was a contract that they would pay the plaintiff for his services?

Mr. Ellis: Yes. We claim that the plaintiff was employed on the basis of reasonable compensation. In that respect, we have two causes of action. The first cause of action is on an express contract. The second cause of action is on the implied contract, and that is if a Court or jury fails to find an express contract, but nevertheless finds that the plaintiff rendered services with the expectation of compensation, and the defendant adopted and used his plans—

The Court: You then ask for *quantum meruit.*

Mr. Ellis: Then we ask for *quantum meruit.* That is our case.

The Court: I think I understand the nature of the complaint. What is the nature of the defense?

Mr. Wallace: The nature of the defense, your Honor, is this. Insofar as the first cause of action is concerned, the plaintiff, Mr. Marshall, never brought his alleged plans to the attention of the defendant. The individual to whom he talked was an officer of a subsidiary of the defendant corporation. He was also a director of the defendant corporation in his capacity as president of the subsidiary.

So in the first place, there was no agreement made by the defendant corporation.

The Court: You maintain, therefore, that this man had no authority to make an agreement?

Mr. Wallace: That is correct, and indeed, that is the law of the case so far, because in an attempt to examine the defendant corporation through this individual, with whom the plaintiff talked, Judge Kaufman of this court held that the plaintiff was not entitled to examine the defendant corporation through this individual. So I maintain that the law of the case is established.

The Court: You say that because he was not an officer of the defendant corporation, they could not examine the corporation through him under the deposition procedure, is that right?

Mr. Wallace: The Court so held in its opinion.

The Court: Does that necessarily mean he could not be held out as an agent of the corporation for the purpose of making a contract? That must depend on the facts, isn't that right?

Mr. Wallace: I submit that this Court, through Judge Kaufman, has already held that this individual with whom the plaintiff claims he talked, was simply the ordinary garden variety of director, without any administrative responsibilities, and therefore, could not enter into an agreement binding the defendant.

The Court: Then you deny there was any such contract and that he was authorized to enter into any contract on behalf of the defendant?

Mr. Ellis: May I interpolate, if the Court please?

The Court: Yes.

Mr. Ellis: The question just raised by counsel in respect of the decision by Judge Kaufman as to the examination of a director of the defendant has nothing to do with the pre-trial request for admissions.

The Court: So far we are simply trying to find out what the facts are.

Mr. Ellis: We expect to prove, regardless of the decision of Judge Kaufman that a director is not examinable on behalf of the corporation, that he is examinable as a witness, and that there was ratification by other officers of the defendant, and that in respect of the director, he was not merely a director but had been vested with authority to make the contract in suit.

The Court: Is there anything else the defendant has to say?

Mr. Wallace: Yes. Insofar as that is concerned, even assuming what the plaintiff says is so, insofar as this alleged ratification is concerned, from the plaintiff's own complaint insofar as the first cause of action is concerned, that is the one on the express contract, and from the attorney's statement before you, he says that the agreement was that reasonable compensation would be paid, and I move now that the first cause of action be dismissed as illusory because there is no definiteness with respect to the alleged contract, and even assuming authority, assuming ratification, there is still no agreement upon which recovery can be had.

The Court: We will take that up when we come to it.

Mr. Wallace: I think that the Court at pre-trial has the power to grant a motion to dismiss the complaint or—

The Court: We will have to move farther along so that the Court will know more about it. Do you have some other defense?

Mr. Wallace: This is the statement that I feel I am constrained to make under calendar rule 15-b. What we intend to prove, as I have already pointed out, is the lack of authority, and in addition to that, this cause of action—both causes of action—both the one on contract and the one on *quantum meruit* are based on alleged service performed. In that regard, the defendant expects to prove that all of the material submitted to this man Friendly, who was the director—that all of that material was merely a counterpart of the materials submitted to half a dozen corporations in and around the City of New York.

The Court: By the plaintiff.

Mr. Wallace: By the plaintiff and his associate, and the material is no part of a work product prepared especially for the defendant corporation.

The Court: You maintain that he was submitting that trying to get a job rather than in compliance with a contract.

Mr. Wallace: We intend to prove that he was submitting this material, which had already been prepared, in attempting to interest Mr. Friendly and these other half a dozen corporations around New York in these alleged ideas of his.

Insofar as what the plaintiff says the ideas consisted of, we intend to prove that these ideas were well known to the defendant. The defendant had a staff of financial people—

The Court: And therefore you say he didn't bring you anything new?

Mr. Wallace: That's right. We knew of this, and indeed that is getting into some of the documents on which I shall ask for admission. The documents show that that was already in existence prior to the time of these talks with Friendly.

The Court: I think I have a general idea of what the plaintiff contends and of what the defendant contends. Now let us take up the various matters to be covered in a pre-trial order. Are any amendments to the pleadings wanted by either side?

Mr. Ellis: Yes, I desire to amend paragraph 8th of the complaint to read as follows: "That from between in and about the month of May, 1949 to and on about February 27th, 1950, plaintiff rendered work, labor and services, etc.;" the change being an extension of the date from December 1949 to February 1950.

The Court: Is there any objection?

Mr. Wallace: No.

The Court: Then the pre-trial order will so indicate the complaint to be amended.

Are any issues to be abandoned by either party, because the next item to be covered is "any tender of issue in pleadings that is to be abandoned by either party."

Mr. Ellis: No.

The Court: Does the defendant intend to abandon any issue?

Mr. Wallace: No.

The Court: Nothing to be abandoned. Now the next question is, "The parties stipulate the following facts." At this point, let me get something down here which I think we should incorporate in the pre-trial order, because I think it is pretty obvious from what I have heard so far, that we are talking rather in generalities, and I would like to get a pre-trial order which would state specifically some of the issues, so that the Court that will try this will have those issues before it. Let us take the contract cause of action.

You say, Mr. Ellis, that your client entered into a contract with somebody from the defendant company, in the first cause of action?

Mr. Ellis: Yes, your Honor.

The Court: Was that contract oral or written?

Mr. Ellis: Oral.

The Court: That was an oral contract. When was it made?

Mr. Ellis: In May, 1949.

The Court: And with whom was that contract made?

Mr. Ellis: It was made originally by Mr. Friendly, the president of a wholly-owned subsidiary of the defendant, and later ratified by Mr. Sanders, vice president of the defendant concerned with the pension plan.

The Court: When did the ratification take place?

Mr. Ellis: The ratification took place in January, 1950.

The Court: And where did it take place?

Mr. Ellis: In New York City.

The Court: In New York City.

Mr. Ellis: At a conference which was attended also by another officer of

the defendant, a Mr. Little, assistant treasurer, who is also concerned with the pension funds invested.

The Court: You are saying that your cause of action for breach of contract is based upon an oral contract made with this director and ratified or approved or carried on by a conference with these two other officers on a date you set. On that point there will be the issue of whether there was an oral contract made on those dates by those people at that place.

Mr. Ellis: Made and ratified.

The Court: And ratified.

Now we come to the next point. The complaint states the nature of the contract rather generally. Specifically, what did the defendant agree in that oral conference?

Mr. Ellis: The defendant asked the plaintiff to prepare charts and statistics to demonstrate the correctness of what was then regarded in big business as an heretical theory, and that is that pension funds could be invested in equity securities with as much safety as securities offered by insurance companies, which would reduce the cost of pension plans, thus enabling the company to include the hourly rated employee at a reduced cost, and give a greater return.

The Court: They asked him to do that. What did they agree would be done for him?

Mr. Ellis: They agreed to pay him reasonable compensation in the event of their adoption and use of these recommendations.

The Court: And you say that was a specific agreement that they made in so many words or substance?

Mr. Ellis: Yes, it was.

The Court: At that conference.

Mr. Ellis: Yes, your Honor.

The Court: And that is your cause of action for breach of this oral contract?

Mr. Ellis: That's right.

The Court: Then you also state a *quantum meruit* cause of action. How does that differ?

Mr. Ellis: That differs in respect of a possible finding by a Court or jury that there was no express contract; that perhaps, as Mr. Wallace suggested, there may be a finding of indefiniteness. In such a case, however, where the cause of action fails because of the lack of adequate proof to demonstrate an express agreement, plaintiff will not be barred recovery if it be established that he did render services which the defendant accepted, and for which there would be an implied obligation to pay.

The Court: Therefore, you have those two causes of action in the alternative.

Mr. Ellis: That is correct.

The Court: The pre-trial order will specifically indicate, as you have stated, who made the contract, the oral contract, the date, the place and in substance what you say was agreed upon at that time.

Now, Mr. Wallace, what do you say as to that? Do you deny that there was such an agreement?

Mr. Wallace: Of course, we deny the agreement. We deny the ratification, and as I have indicated before, I deny the authority of the individual who allegedly entered into this.

The Court: That, therefore, will present issues of fact and issues of law. There will be issues of fact as to whether in fact those agreements were made, and what was said at the conference. Then I take it, there will be an issue of law as to whether that agreement as alleged by the plaintiff was made by a director of the company, whether it is an agreement binding upon the defendant. Do you understand that those are the issues?

Mr. Wallace: I think we can dispose of the issue of law right here.

The Court: You think that on that this Court can rule?

Mr. Wallace: I think so.

The Court: I would feel on that, that it would not be appropriate to dispose of that at pre-trial because that would depend on all the testimony that comes out at the trial, which might have some bearing upon what authority this director may have. I don't see how we can do it in the absence of testimony with all the surrounding circumstances.

Mr. Wallace: That may be true with respect to authority, but I am going further than the point I raised before. Even assuming ratification, the agreement is illusory.

The Court: You say that it is illusory because of the fact that no agreed compensation was put in?

Mr. Wallace: That's right.

The Court: Mr. Ellis says it was agreed that they were to pay him a reasonable sum. Why is that illusory?

Mr. Wallace: Because it is not definite.

Mr. Ellis: May I suggest, if your Honor pleases—

The Court: I will say on that, that I will be glad to have briefs on that subject to rule on, but I am inclined to feel that it may be sufficiently definite to stand as a contract.

Mr. Ellis: May I suggest, if your Honor pleases, I doubt the propriety of a motion to dismiss at a pre-trial conference. I don't think this is a place to make such a motion. I think that motion should be made in motion part with briefs and reply briefs and should not be heard in a pre-trial conference. I think the purpose of a pre-trial conference, as has been well said tonight, is to narrow the issues, simplify the issues and avoid inconvenience in the offer of proof, but certainly not to pass upon motions to dismiss the complaint or dismiss defenses.

The Court: I think you are right, except for this, that if it appears in the courses of a pre-trial conference that the complaint does not state a cause of action, then the pre-trial judge, I think, can take such steps as are necessary there to dismiss the complaint. But I will tell you this, I would not do that without giving full opportunity for briefs, argument and discussion as though in a motion part. I would not refer it to a motion part when I heard

the whole argument myself. However, I am inclined to think that I would deny such a motion. But I would welcome the furnishing of briefs.

Mr. Wallace: I have plenty of authority that a pre-trial judge may grant such a motion.

The Court: I would like to have you submit what authority you have before I were to grant such a motion.

Now we have gone into such facts which I take it are the stipulated facts in the cause of action. Mr. Wallace, you have said something about the plaintiff offering his plan to other people. Are there any facts that you want stipulated with reference to that?

Mr. Wallace: Yes. I would like stipulations from counsel for the plaintiff that during the period of 1949 and 1950, prior to these conversations which the plaintiff had with Mr. Friendly, that he also talked with several corporations in and around the City of New York.

In that regard, we have exhibits which bear the plaintiff's signature. We have photostatic copies of documents which were submitted to these other companies and I would like a concession from the plaintiff's attorney with respect merely to the fact that these are the documents which the plaintiff submitted during this contemporaneous period and prior thereto, to these other companies in and around the City of New York and elsewhere.

The Court: You say that these documents that he submitted to your company he also submitted to other companies at the same time, at approximately the same time?

Mr. Wallace: Yes, your Honor.

The Court: And you would like to find out if the plaintiff will concede that that is a fact?

Mr. Ellis: I will concede that the plaintiff was in communication with various companies in respect of his ideas as to investment of pension funds, but of course, we take the position that we have no cause of action against any of them because none of them used the plan, whereas the defendant accepted the plaintiff's services under agreement to compensate. So we regard it as utterly immaterial if he showed it to a hundred people; so long as he specifically performed services under an obligation to pay.

Mr. Wallace: I am merely asking for a concession as to competency.

Mr. Ellis: What do they consist of?

Mr. Wallace: They consist of documents and these are the documents that I submitted to you, which were submitted to these other companies. I think one of them is entitled "Pension Plans. They promise. Will they perform?" Another one is called: "The American Securities Club," and those are documents which bear the plaintiff's signature and which were submitted to one of the steel companies, to the telephone company and to one of the unions.

Mr. Ellis: I will concede that if a representative of these companies were called to testify, he would testify that the plaintiff delivered to him a document of the character described.

The Court: In other words, it will not be necessary for the defendant to

subpoena people from these companies; that you will concede that the plaintiff did deliver these documents to the steel company, the telephone company and this union?

Mr. Ellis: I will concede that if a representative so testified, the documents submitted are the documents described.

The Court: Let me ask you this. You say "If a representative so testified." You mean that the defendant has to call a representative to testify?

Mr. Ellis: No, I will stipulate, in lieu of his testimony, that these documents are authentic.

The Court: And that a representative would so testify.

Mr. Ellis: That's right.

The Court: Therefore, there would be no necessity to subpoena witnesses from out of the state to so testify.

Mr. Ellis: That is the purpose of the concession.

The Court: Now I would want counsel to agree on these documents before the pre-trial conference is ended so that they can be marked with an exhibit number, so that we can know what the concession is and what the particular document is and the particular time when they were delivered. Will counsel stipulate on that?

Mr. Ellis: May I say, I would also like to have the defendant admit the genuineness of the list of documents which appear in my pre-trial memorandum on pages 11 to 16 inclusive.

Mr. Wallace: I won't concede they are genuine because insofar as some of them are concerned, they are merely copies of charts issued by the National Bureau of Economic Research, the Bureau of Labor Statistics, Standard & Poor's and other similar organizations. I will stipulate that those documents were submitted by the plaintiff to Friendly, and they bore the plaintiff's name, but in that regard, I also ask for a stipulation that these are not the work product, are not claimed to be the work product of the plaintiff. I understand that the plaintiff is not claiming originality; that these are merely copies of other documents.

Mr. Ellis: That is not so.

The Court: Let us divide this into two parts. You will concede that these documents were delivered to Mr. Friendly?

Mr. Wallace: Yes.

The Court: That is stipulated.

Mr. Wallace: Yes, I think there is one document that I don't concede was delivered because Friendly testified in his deposition that it was not, but as to that, I think I will stipulate that if the plaintiff's wife were called, that she would testify she delivered it to Friendly because that is what the plaintiff said in his deposition, and it would be unnecessary to call the plaintiff's wife.

The Court: That will save that. Then you will stipulate that these documents were delivered to Friendly?

Mr. Wallace: Yes, sir.

The Court: You will not stipulate that they are original?

Mr. Wallace: That is correct.

The Court: Or original work?

Mr. Wallace: That is right.

The Court: What do you say to that? What do you want, Mr. Ellis? Were they an original work product?

Mr. Ellis: Some of them were and some of them were not, and I address myself to those which we claim and which the defendant knows are original products; such as the seven copies of a pamphlet specially prepared and compiled by the plaintiff and delivered, as Mr. Wallace just indicated, by the plaintiff's wife to Mr. Friendly, the president of the subsidiary.

The Court: You say that was an original work product and not a compilation taken from somebody else?

Mr. Ellis: The contents may have been derived from many sources but it was entirely original.

The Court: You deny that?

Mr. Wallace: Yes, and now we are arguing evidence, Judge. I will just say that pieces of paper were delivered.

The Court: That is as far as the stipulation will go, that they were delivered, and the plaintiff will not have to establish whether they were delivered or not.

Now we have the stipulation as to the documents. Are there any other documents which are involved here where either party wants a stipulation, which will save calling a witness or anything of that kind?

Mr. Wallace: Yes. I would like a stipulation that all of the plaintiff's expenses during the period when he was allegedly doing this work for the defendant corporation and during the period when he prepared the other documents for the other companies I have mentioned, all his expenses were paid by his associate, Mr. Hill. I think that we have marked some checks for identification indicating a series of about $12,000.00 worth of checks issued by Mr. Hill, who was the plaintiff's associate, to Mr. Marshall during that period, and I would like a concession of their authenticity.

Mr. Ellis: Again I say it is wholly immaterial what somebody else paid the plaintiff. The issue here is what the defendant should have done.

Mr. Wallace: That is evidence, and that is getting to the trial. All I want is a concession so I don't have to call Hill to the stand that these checks were issued and bear the signature and were delivered to the plaintiff.

The Court: And cashed by the plaintiff.

Mr. Wallace: Yes.

The Court: What relevancy does that have in the case?

Mr. Wallace: That all his expenses were paid during this period. He was paid for any work he has done.

The Court: And you say Mr. Hill is the man who should have paid and not the defendant.

Mr. Wallace: And he has paid it.

The Court: That, of course, may be an issue for the trial.

Mr. Wallace: All I want is the competency.

Mr. Ellis: Are they listed in your pre-trial memorandum?

Mr. Wallace: Yes, there is a list of checks amounting to $12,000.00.

Mr. Ellis: I will show those checks to the plaintiff and I will give you a concession if he affirms that he received those checks and deposited them and that they were paid.

The Court: Then the question as to whether they are relevant will be reserved to the time of trial.

Mr. Ellis: That is correct.

The Court: Any other concession as to documents?

Mr. Wallace: Yes, Judge. There are numerous magazine articles and newspaper articles published contemporaneously with plaintiff's conversations with Friendly. I would like a concession that these articles appeared in the various periodicals listed and the newspapers mentioned.

The Court: And contain the same sort of things that the plaintiff said about the investment of funds.

Mr. Wallace: Precisely.

The Court: What do you have to say to that, Mr. Ellis?

Mr. Ellis: I certainly will not require the defendant to call witnesses to establish the publication of magazine or newspaper articles, and I expect a similar concession from the defendant as to newspaper articles announcing the adoption of the pension plan by the defendant.

Mr. Wallace: Yes, sir.

The Court: Let us see if we cannot concede this, that all these newspaper and magazine articles referred to in the pre-trial memoranda you will concede were published.

Mr. Ellis: Exactly.

The Court: So that we don't have to call any witness on that.

Mr. Wallace, you will concede the fact, as shown in any corporate document, about the adoption of any pension plan by your client; is that right, or what document will they be shown in?

Mr. Wallace: Are you referring to corporate minutes?

Mr. Ellis: No, I think the Court is referring to what I referred to in my pre-trial memorandum. I required the defendant to produce a compilation or table showing the percentage of its pension funds which have been invested in equity securities since the agreement with the plaintiff and since the plaintiff made his recommendations to the defendant, in order to enable us to establish that the plan recommended by the plaintiff was substantially adopted by the defendant. That information is wholly within the possession and knowledge of the defendant. I would like it dollar wise as well as percentage wise, so that you don't have to give the name of the security.

Mr. Wallace: That is not quite true as the plaintiff's attorney states it. There is a question here of confidential communication. This investment program is not carried on by the defendant but by its trustees. Whether or not we can divulge the investment by trustee banks, there is some question involved.

The Court: Are they trustees of a pension plan for the employees of your client?

Mr. Wallace: That is correct.

The Court: And as such, are they employed by your client?

Mr. Wallace: Yes.

The Court: And they administer the funds to maintain that pension plan for your client's employees?

Mr. Wallace: That is correct.

The Court: First of all, let us deal with this question of the corporate documents. I see no reason why, if the plaintiff wants it, he should not have any copy of minutes specifically dealing with the establishment of a pension plan after the date when he says he performed the services.

Mr. Wallace: No reason. I have no objection to that.

The Court: And if there is any notice sent out by the corporation to stockholders—

Mr. Wallace: We have already supplied those in depositions.

The Court: Then he will have those and there is no question about that.

Now then, we come down to the question that Mr. Ellis asked about the actual investment of funds. Mr. Ellis said that he is entitled to know how your funds were invested after the plaintiff, he says, made these recommendations. Why shouldn't he have that information?

Mr. Wallace: I think that is a question you ought to direct to the trustees. I don't represent them. They are not before you at this hearing.

Mr. Ellis: There is no privilege involved. They are agents of the defendant.

Mr. Wallace: There is a fiduciary relationship involved.

The Court: Fiduciary relation for your client?

Mr. Wallace: That's right.

The Court: Aren't they in effect employees of your client?

Mr. Wallace: They are not employees, they are trustees.

The Court: They are trustees because you designated them.

Mr. Wallace: Yes, Judge.

The Court: I see no reason, therefore, why a compilation should not be made. I take it, Mr. Ellis, you don't want the details?

Mr. Ellis: No, your Honor.

The Court: What exactly is it that you want?

Mr. Ellis: I want a statement showing the percentage of the total pension funds which the defendant invested in equity securities after the agreement with plaintiff as compared with the period preceding.

The Court: Let us say within a year after this date or this alleged contract as compared with a year previous.

Mr. Ellis: Because it is conceded by the defendant that prior to the agreement with the plaintiff, no pension funds were invested in equity securities, and that subsequent to the agreement, there were?

Mr. Wallace: The law was changed in 1950. I don't think that has anything to do with it.

The Court: You are ready to let the chips fall where they may and if they were invested, you have no objection to revealing that fact?

Mr. Wallace: Subject to this: if you order me to produce them, I will do so, but I have to protect my client against any claims by these trustees. If you order me to produce them, I will do so.

The Court: I will order you to produce them and you will tell the trustees

to produce them, and if you have anything confidential in there that you think should not be produced, let me know what that is so that I can specifically give attention to it; but I can see no reason why those percentages should not be given.

Mr. Wallace: In that regard, I assume you are preserving jurisdiction over this case for the purpose of this pre-trial?

The Court: That is correct.

Mr. Wallace: And I would suggest if I get this information which up to this time has never been publicly divulged, that I will submit it to you and to Mr. Ellis and that it not be made part of a public record.

The Court: Until the trial, if necessary. We will consider it at that time. If you don't want to do it—if the trustees don't want to do it, I suppose the Court has it within its power to compel the trustees to testify, and I think it would be a good deal better all around if you can get the information.

Mr. Wallace: It would be better if the plaintiff subpoenas the trustees, and let him examine them as witnesses.

The Court: That would be a waste of his time and the time of your trustees, if you can get it, and I take it you can get it.

Mr. Wallace: Pursuant to your order I will get it.

The Court: Then you will get it.

How about the next item, names and specialties of any experts to be called as witnesses?

Mr. Wallace: We have listed our proposed experts. They are individuals who are actually engaged as actuaries and as pension experts to work on the plan.

The Court: Do you have any experts, Mr. Ellis?

Mr. Ellis: I pose a problem. I think experts in several directions might be permissible here, or in fact, are desirable; experts on pension plans I can very clearly see; certainly, they are very desirable, but we may very well have to call experts on the reasonable value of plaintiff's services, and I am not too clear as to whether or not in the circumstances of this case there is no definite standard or norm. I don't know just what kind of an expert they want to testify as to compensation.

The Court: You may call an expert or you may not.

Mr. Ellis: That is it.

The Court: I think what we should provide, as we customarily do on these things, is that you will give the name and address and qualifications of your experts to your adversary ten days before the trial starts.

Mr. Ellis: Very well.

The Court: And you will do the same, Mr. Wallace.

Mr. Wallace: Yes, Judge.

The Court: If you want to change any of those in your memorandum, that will be done so that each side will know what experts are to be called and on what they will testify.

Mr. Ellis: And may I suggest that the background of each expert be given so that there are no surprises at the trial, so that we can have the experts to match the quality and standards of the experts which Mr. Wallace intends to call.

The Court: That is if somebody is going to qualify as to the value of the services, it ought to be stated who he is and what his address is, and if somebody is going to testify as to investments, that ought to be stated; so that the other side can produce comparable experts and be prepared to cross-examine.

Mr. Ellis: That is right.

The Court: And his business background.

Mr. Ellis: That's right. He may bring a man with forty years' experience, and I may come to the trial with a man who has had only one year's experience.

The Court: I doubt that, Mr. Ellis.

That will be embodied in the pre-trial order; the names of experts and their qualifications, addresses and business connections must be exchanged ten days before the trial actually starts.

Mr. Wallace: Yes, sir.

The Court: There is one question I have in mind here. We are getting along on this thing—there are not many more things we have to embody—and that is this. You have these two causes of action, one on a contract which you say is a definite contract, and then you are suing on the *quantum meruit*. Don't you have to elect between those two before you go to trial?

Mr. Ellis: No, I don't think the law requires us to elect.

The Court: You don't intend to elect?

Mr. Ellis: I don't intend to and I should not be required to. As a matter of fact, the second cause of action is a very familiar companion to an express allegation of an express contract.

The Court: Do you agree that he does not have to elect between the two causes of action before going to trial?

Mr. Wallace: I think his first cause of action should be dismissed.

Mr. Ellis: You can plainly see that Mr. Wallace does not want to try this case.

The Court: If it is not dismissed, do you think he can go ahead without making an election; or would you require him to elect?

Mr. Wallace: I think at some time he would have to elect, probably at the trial.

Mr. Ellis: I don't think so.

The Court: We won't pass upon that. I just want to throw it out so you will have it in mind.

Mr. Wallace: Before it goes to the jury, anyway.

The Court: I am not so sure. We will leave that to the trial.

The next item is this: you have to agree on what are the claims for damages as of the date of this contract.

Mr. Ellis: My client modestly claims a half million dollars.

The Court: Is it your position that that is a realistic claim?

Mr. Ellis: Yes, or whatever the jury will find the services are worth.

The Court: Do you want to state another figure?

Mr. Ellis: I will not reduce it, Judge. You must bear in mind the total amount of the pension funds involved here is about $9,000,000.00. I think a jury should readily give us a half a million dollars.

The Court: There is no counter-claim, so we will put in that your claim is

for the value of services which you claim amount to half a million dollars.

Then we have agreed on certain matters. I may say for the audience that this is a condensation of a pre-trial, covering it rather rapidly.

Mr. Ellis: I would like to request the Court to make an order or direction of a pre-trial order permitting me to examine Mr. Little, the assistant treasurer, on the subject of the authority of Mr. Friendly and Mr. Sanders, who were both present with him at the conference at which the plaintiff stated his plans and at which ratification of the agreement was made.

Mr. Wallace: How can an assistant treasurer testify as to the authority of a director or president of a subsidiary corporation? I doubt that he is even an officer.

Mr. Ellis: Regardless of whether he is an officer or not, he certainly can testify from his own knowledge as to what the activities and the ambit of their authority have been so far as actual practice is concerned, and not theoretical.

Mr. Wallace: I don't see that that is any part of a pre-trial. If you want to examine a man as a witness, serve a notice with a subpoena.

Mr. Ellis: That is the way to prove authority. If you can't prove express authority, you prove it by the actions and conduct of an officer.

The Court: Let me ask you this. Have you taken the depositions of any of these people on the question of authority?

Mr. Ellis: We have taken the depositions of Mr. Friendly and Mr. Sanders, but we have not taken the deposition of Mr. Little. He is in New York, and he was present at the conference. I see no reason why he should not be examined.

The Court: Mr. Wallace of course will say, not being an officer, you can only examine him as a witness and not as a representative of the defendant, I take it. Is that your position?

Mr. Wallace: That is correct. That is what Judge Kaufman has held incidentally.

The Court: Well, we are not necessarily bound by the lower Court. (laughter)

Is there any reason why a deposition should not be taken? What is all the fuss about? If they want a deposition, why shouldn't it be taken?

Mr. Wallace: Serve a subpoena and a notice.

Mr. Ellis: That is the purpose of this pre-trial.

Mr. Wallace: The purpose of the pre-trial, I thought, was to cut down depositions. We went through a lot of stipulations, and now we are starting all over again with depositions.

Mr. Ellis: You know better than that, Mr. Wallace.

The Court: This sounds like a pre-trial.

Mr. Ellis: The purpose is to cut down issues, to narrow the issues.

Mr. Wallace: Let us narrow them, right here, without going into depositions.

The Court: Let me ask you this, Mr. Wallace. Will you concede that if this man is called, he will make certain statements about the authority of Mr. Friendly?

Mr. Wallace: No, because he is not competent to testify as to Friendly's authority.

Mr. Ellis: What is wrong with him? (laughter)

The Court: Are you ready to stipulate that he can testify as to what activities Friendly did participate in for the company; what he did in fact for the company?

Mr. Wallace: I will stipulate right now what Friendly did, what his office was. He was president of the finance corporation. I will give the statement for the record now.

The Court: I guess Mr. Ellis wants the statement of the other man.

Mr. Wallace: That has nothing to do with it.

The Court: I see no reason why this testimony should not be taken if Mr. Ellis wants it. Apparently we cannot reach any concession as to what it should be. Mr. Ellis has a right to get the testimony of the witness for whatever it may be worth, and I am not going to require that he go into any motion term to get it. So, Mr. Ellis, if you submit an order requesting that deposition of this man, I will issue the order forthwith.

Mr. Ellis: Thank you.

Mr. Wallace: In that regard, I will ask you, Judge, to retain jurisdiction over the taking of this deposition.

The Court: Certainly.

Mr. Wallace: Because if statements are made with respect to what the deposition is about, if it goes far afield, I want to be able to go to you for a ruling.

The Court: Certainly, it may be referred directly to me.

Are there any further questions?

Mr. Ellis: No, sir.

The Court: Then the case is ready to go to trial upon the taking of this deposition.

The final pre-trial order will set forth the issues we have covered here.

I will formulate those and give them to the Reporter essentially as I see it. Talking out loud, the issues are: One, was there any contract—oral contract—entered into between the defendant and the plaintiff under which the defendant agreed to pay to the plaintiff a reasonable amount for services to be performed by the plaintiff, which services consisted of giving information to the defendant with regard to the formulation of a pension fund by the defendant.

Two: What was the reasonable value of the services, if services were performed.

The third issue will be an issue of law, to this effect: If an oral agreement was made by Mr. Friendly or these other people who will be referred to in the pre-trial order, whether those people had the authority to bind the defendant. That will be an issue of law.

Now then, there is one rather intangible issue that the defendant has brought up here.

I take it that that issue is this; whether what the plaintiff was doing was acting as a volunteer in this matter.

Mr. Wallace: I think he was a pedlar.

The Court: A solicitor, soliciting business, and therefore what he was offering to the defendant was not offered with an understanding that he was to be paid for it, but was done as somebody soliciting business, who would only be paid if thereafter he was retained, much as an insurance agent.

Mr. Ellis: May I suggest that this plaintiff then is probably the most magnificent pedlar that ever lived because the defendant bought his wares.

Mr. Wallace: We are in the trial now.

The Court: We will have to frame some issue there as to whether the plaintiff, in offering his wares, was offering them with the understanding that he would be paid for them, or was offering them with an intent to be retained—much in the manner of an insurance agent. Isn't that an issue that is going to come up?

Mr. Ellis: I think one excludes the other, Judge. If the jury finds that he was entitled to be paid for services rendered, then it excludes the volunteer aspect. I don't think the analogy follows here, Judge, of the plaintiff acting as an insurance salesman does.

The Court: I am wondering whether on the *quantum meruit* theory, you don't have to have an issue whether, when he presented ideas and documents to the defendant, he was doing that with a view to be compensated for those ideas and documents, or whether he was volunteering those in the hope that that would lead to a contract.

Mr. Ellis: I say, if the jury finds that the defendant agreed to pay him, it disposes of the other.

The Court: On the *quantum meruit* issue, of course, you have also the issue as to whether the plaintiff actually did give the defendant certain information, and how much that was worth; how much the services would be worth.

I will endeavor to formulate those issues after we have had the transcript typed out. I will submit those issues we decide on. I will draft up a pre-trial order trying to embody all the agreements. It will be in draft form. I will submit it to both of you, and I will get back the ideas of both of you on the pre-trial order, and if we can reach an agreement on the pre-trial order, it will be signed by counsel for both sides.

In the meantime, submit your order for the deposition so that there will be no delay.

That will conclude the pre-trial conference.

(Pre-trial conference concluded.)

The Moral Decision: Right and Wrong in the Light of American Law

A REVIEW*

By Beryl Harold Levy

At about the time our nation was being founded, the most influential law book of our times appeared in England, written by the first lawyer to give a course in the common law at any university. To him the common law was the "perfection of reason," a kind of "secondary law of nature," which commanded what was morally good and prohibited what was morally bad. There was not any (or hardly any) need for criticism or change. His book was a central source of law in the book-poor colonies, one of the few authorities cited by Chief Justice Marshall. The book was, of course, *Commentaries on the Law of England;* the author, Blackstone.

Now, a century and a half later, we have come full cycle, signalized by the publication of Edmond Cahn's extraordinary book, *The Moral Decision: Right and Wrong According to American Law.* Readers of books about law will know that the author of *The Sense of Injustice* could not fail to probe deeply with tools of contemporary knowledge sharpened against a whetstone of broad erudition. No cybernetic substitute for the distillate of wisdom has yet been devised; and Cahn's human insight is the kind good lawyers and judges share with good novelists, physicians, and philosophers.

The law itself is here judged in terms of whether it is right or wrong; and our conceptions of right and wrong are in turn refined by pondering specific situations in concrete law cases (after the manner of lawyers with the common law). We learn to know more about what we think is wrong through avoiding mere ethical generalities and moral maxims; we learn by reacting to a specific outrage as full human beings—glands, emotions, mind, and all—and then becoming, with the author, reflectively self-conscious about our reactions. The law comes to be judged before the bar of our moral judgment, but our moral judgment is itself clarified by exploring the implications of selected law cases.

One main thrust of contemporary jurisprudence was bound to wind up with an effort of this kind, were any jurisprude hardy enough to risk the hazards. The relation of morals to law, as von Jehring said, is the Cape Horn of jurisprudence; many a mariner, e'er we ventured, has been wrecked upon

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* Cahn, Edmond. The Moral Decision: Right and Wrong According to American Law. Indiana University Press, Bloomington 1955. 342pp. $5.00.

that coast. But where else could the drive of the great tradition—the tradition of Holmes and Cardozo—take us? Once we have abandoned a naive belief in mechanical decision by manipulation of precedents, we cannot escape the task of facing up squarely to the bases for evaluation among conflicting analogies or in the choice of a fresh course. Unless such evaluation is to be made covertly and without clear-cut articulation, we must wrestle, as we have not had to wrestle before, with the deepest issues of morality in an urbanizing society beset by technological change, torn by a manichean divide between Light and Darkness, in a babel of ethical teachings, religious and secular, Judeo-Christian and utilitarian.

Where Cahn's earlier book dealt with the "sense of injustice," the present one may be said to deal with the "sense of wrong" in relation to justice as administered by courts. It is an enquiry into morals as well as law—or even more than into law. But because the materials of the enquiry are law cases, we have a reciprocating illumination. Morals gain a new insight and method; the law is given a base which could never be found through verbal prestidigitation of bold-face rules. How much jurisprudence still stinks in the nostrils of the practicing lawyer (as Holdsworth said) and how ready we are today to move on to this base: these imponderables constitute the most engrossing frontier in the practice of law today for any one who takes the judicial process and legal method as developing disciplines.

The book, like Greek tragedy, has a beginning, a middle, and an end: Part One—the Legal and the Good; Part Two—Moral Guides in the American Law of Rights; Part Three—Moral Guides in the American Law of Procedure.

Part One handles the moralities of our time as some visitor from a planet of lawyers, knowing only our legal system and nothing else, would try to order them. The vulnerabilities of Professor Morgan, Justice Cardozo, and Felix Cohen (none of them mentioned by name) are then gently avoided in Cahn's denotation of the relation of morals and law as residing in enforceability.

The heart of the book is the middle section where leading cases, dramatically re-told, delve into the thorniest questions we can ask about the value of life, sexual relations, business conduct, contact with government, the broadening of personality, and death. Under each rubric the author considers three cases, many of them familiar, such as *Meinhard* v. *Salmond* on the "radius of loyalty" in business, *Wagner* v. *the Railroad* on the "quandary of the Good Samaritan." What is remarkable about the discussion is its aseptic realism, as in the discussion of cheating on taxes or indulging in forbidden fruits. ". . . . take us all in all, we are none of us much better than we ought to be." Yet, without preachiness, there is a quiet exploration of the way in which the law broadens to embrace wider moral obligations as our civilization develops: from a duty to the family to an emerging duty to a suffering bystander. The unique strength of the book lies in this absence of conventional hypocrisies combined with true directions of elevation predicated on human nature as we find it. By this route, we can be honest with ourselves and sincerely decent at the same time.

From his discussion of the family in Part Two we may take samples of his insight and aphoristic style, by which form joins function for a vigorous impact.

> "The law may tell the American father he is sovereign, but his children have taught him otherwise. It is well that they have: as a constitutional monarch useful on ceremonial occasions and skilled at repair jobs around the house, he has his place. If he does not attempt to rule, he will probably be allowed to reign, provided, of course, the mother of the family does not choose to do so. Whenever she does, she can readily displace him. But while her reign would generally surpass his in judgment and competence, she will be better advised to allow him the illusion of retaining some slight remnant of authority. The reason being, of course, that if she does not, it is likely that some other woman will—and that consideration brings us back to our principal case. . . ." (80)

In the principal case an injunction was denied which would have prohibited the father from living with the other woman. The author happens to agree with the court, in this instance, and he concludes:

> "It is just because we know family affection cannot be commanded or coerced that we look upon it as a priceless gift. Where it resides, a sacred spirit takes dwelling and suffuses the hearth with happiness. If the maxims of moral administration call occasionally for submitting to restraint and repressing proof that one is right, their rewards are rich beyond the deserts of any of us. As a general rule, it is far better to establish a home than an opinion." (87)

In rejecting the notion of the family as a *unit* and insisting instead on the "domestic relations" of parent and child, husband and wife, our law is consistent with the common law emphasis on relations, as Dean Pound has expounded it and as we find it in the law of labor relations, landlord and tenant, buyer and seller.

> "This does not mean, of course, that our courts are naive enough to overlook the persistence of family selfishness and cupidity in general wherever money is involved, or in particular where the money is claimed by the government for taxes. . . . Does the tax collector have the only means by which brothers may be persuaded to live together in unity?" (83)

You can see from these excerpts what I mean by the grim acceptance of the *actual* but without failure to project a meaningful and unillusioned *fulfillment*. It is this fusion, subtly forged, which reminds one of Santayana's summation of Aristotle: ". . . everything ideal has a natural basis and everything natural an ideal development."

As he arrays and arraigns the law, always with respect, and even reverence, but without dulling the edge of his scalpel, he does not hesitate to bring the

great ones to book. Holmes would not extend the doctrine of attractive nuisance to a child who wandered off a road and was burned in a pool of sulphuric acid left by a chemical company. "A road is not an invitation to leave it elsewhere than at its end." But Holmes upheld an adult who trespassed on large expanses of unused land to gather mussels for buttons. "A license may be implied from the habits of the country." The contrast leads our author wryly to observe:

> "Thus Holmes showed that he was no servile worshiper of boundary lines; he could project himself into the position of an adult who, wandering over the line, was licensed by the *local* habits of adults. Unfortunately he could not understand that a child may be licensed by the *universal* habits of children." (76)

In making these remarks, he is commenting on the famous turntable case, which he discusses under the provocative heading "the right to be young," and he concludes: "We can preserve what is precious and fair in childhood only by insisting that a road is an invitation to leave it at any point, at any impulse, and for any unseen pool." (77)

In the final section on procedure, we encounter Learned Hand warmly appreciated but handled with cotton gloves, after the author's manner. "What the community needs most is the moral leadership of such a man as Learned Hand and the full benefit of his mature and chastened wisdom." (310) Yet for almost 30 years, Judge Hand is deemed to have pinioned us and himself needlessly on the horns of a gratuitous dilemma. An alien is to be denied citizenship if he does not meet the procedural test of "good moral character." Says Hand:

> "Our duty in such cases, as we understand it, is to divine what the 'common conscience' prevalent at the time demands, and it is impossible in practice to ascertain what in a given instance it does demand." (*Johnson* v. *U.S.*, 186 F. 2d 588, 590, 2d Cir. 1951)

As to which Cahn comments: "Rarely does one observe a judge clinging with such tenacity to a rule of decision while he himself repeatedly demonstrates its worthlessness." (304) The judge is trying to return to the community the task which the statute imposed on him.

> "When various groups in the community present a number of diverse or opposing attitudes there is as affirmative an act of personal enterprise and moral commitment in *selecting* one perspective from the available many as in *establishing* a perspective which one believes to be entirely original. The human conscience is not constituted to function like an inert and neutral mirror, for even when it wills to deny its own authentic impulses, it must, at very least, choose the objects it will turn to and reflect in their stead. If we appear to be enforcing what we call community opinions, it is generally because we have previously sorted the ones we find most expedient. Doing so, we

> legislate standards for ourselves not a whit the less. The essential difference is that by attributing a standard to the welter of the community's conscience, we may delude ourselves that we are somehow cleansed of personal responsibility." (306)

But does it not make a difference if the judge tries to do his job by trying to discern what the community's norm would be? In a dissenting viewpoint, Judge Frank thought—if this criterion were to be followed rather than that of the ethical leaders of the community—that the way to go about finding out the community's opinion was to send the case back to the trial judge to get "reliable information" on that point. This suggestion is an apt application of Frank's repeated insistence on more attention to the techniques of the "courthouse government" of a trial court in any lawsuit which is also a fact-suit.

Reviews in this journal have been more in the nature of celebrations or reports than critical dissections. I shall therefore refrain from argument, even though Cahn's analogies between a legal and moral "order" seem to me to suffer, perhaps like any new enterprise of thought, through being a bit forced. Nor shall I conclude with any explicit word of praise, mindful of Thoreau's caveat:

> "To compliment often implies an assumption of superiority in the complimenter. It is, in fact, a subtle detraction."

Recent Decisions of the New York Court of Appeals

By Sheldon Oliensis and Joseph H. Flom

ISRAEL v. WOOD DOLSON COMPANY, INC.

(1 N. Y. 2d 116, April 19, 1956)

The Court of Appeals has handed down a decision which constitutes a substantial departure from the conventional rules of *res judicata* and may have important practical consequences.

The complaint alleged two causes of action: the first, against defendant Wood Dolson, for breach of contract; the second, against defendant Gross, for inducing the breach. At trial, the two causes of action were severed on plaintiff's motion, and the trial proceeded against Wood Dolson alone for breach of contract. The jury found for plaintiff, but the trial judge dismissed the complaint on the ground that the plaintiff had failed to prove a breach of contract.

Gross, although he had not been a party to the trial, then moved for summary judgment on the ground of *res judicata*. Special Term denied the motion. The Appellate Division, First Department, unanimously reversed and ordered the complaint against Gross dismissed. The Court of Appeals unanimously affirmed the judgment of the Appellate Division.

In an opinion by Chief Judge Conway, the Court approved the general rule on which the decision of Special Term had been based: that a judgment is binding only upon the parties to the prior action and their privies.

This doctrine is, however, subject to certain specific exceptions, the Court noted. Where a plaintiff, unsuccessful against one defendant, brings a second action against a different defendant, the second defendant may assert the defense of *res judicata* against the plaintiff if there existed between the first and second defendants the relationship of principal and agent, master and servant, or indemnitor and indemnitee, unless the basis of the judgment was personal to the first defendant. *Res judicata* is available under such circumstances despite the fact that the plaintiff, if successful in the first action, could not in the suit against the second defendant have taken advantage of the prior adjudication.

On this latter point, the Court quoted from its decision in *Good Health Dairy Products Corp.* v. *Emery*, 275 N.Y. 14, 9 N. E. 2d 758 (1937), that mutuality of estoppel is unnecessary where the party *against* whom the plea of *res judicata* is raised in the second suit was a party to the prior action and had full opportunity to litigate the issue of his responsibility.

The fact that a party has not had his day in court on an issue *as against a*

particular litigant is therefore not decisive in determining whether or not the defense of *res judicata* is applicable.

In the recognized exceptions, the Court stated, the crucial factor is not mutuality or the lack of it but the fact that the liability of both defendants is dependent upon the adjudication of identical issues. Since the complaining party has been given full opportunity to litigate those issues against one party and has been defeated, he is not permitted to relitigate the same issues in a new action against the other. Here the liability of Wood Dolson and Gross turned on the identical issue, *i.e.,* the breach of contract by Wood Dolson; plaintiff therefore cannot relitigate that issue.

The Court cautioned that its holding did not add another general class of cases to the list of "exceptions" to the rule requiring mutuality of estoppel, but was "merely the announcement of the underlying principle which is found in the cases classed as 'exceptions' to the mutuality rule."

The decision, even on its very facts, represents a substantial broadening of the availability of *res judicata* and an equivalent narrowing of the rule requiring mutuality. By substituting for the limited exceptions to the mutuality doctrine the test of "identity of issues," the Court permits invocation of estoppel by judgment in many instances where it has heretofore been unavailable.

Thus, where a plaintiff insured under several standard form insurance policies is defeated in an action against one insurer, it would seem that the other insurers could now have the complaints against them dismissed on a motion for summary judgment (assuming the judgment was not on a basis personal to the first defendant). Even where the policies differed, the same result would seem to follow if the judgment in the first action were on an identical issue present in the others, *e.g.,* whether a given fire was the result of arson.

Similarly, a plaintiff found to have been contributorily negligent in a suit against one party to an accident would seem to be barred by the doctrine of *res judicata,* as enunciated by the Court, from suing other parties to the same accident.

The converse would not appear to be true, although the decision of the Court is not wholly clear on this point. On the one hand, the decision indicates that the "identity of issues" test is applicable only in determining the applicability of *res judicata* as a defense. But the language quoted with apparent approval from the *Good Health* case includes the sentence:

> "Where a full opportunity has been afforded to a party to the prior action *and he has failed to prove his freedom from liability* or to establish liability or culpability on the part of another, there is no reason for permitting him to retry these issues." (Italics supplied).

This sentence seems to contemplate that a defendant against whom an issue has been adjudicated in a suit by one plaintiff would be barred from relitigating the issue in suits by other plaintiffs.

The practical effects of such a holding would be far-reaching. Thus, in a

bus, plane or train accident in which a number of persons were injured, a successful suit by one plaintiff might establish the liability of the carrier as a matter of law in all subsequent actions. The converse would not of course be true since, if the carrier were successful in the original suit, it could not assert that judgment against plaintiffs in subsequent actions.

The Court's quotation, without comment, of the above sentence from the *Good Health* case seems curious since the *Good Health* case has been distinguished in the past to exclude the affirmative use of the doctrine of *res judicata*. See *Elder* v. *New York & Pa. Motor Express, Inc.*, 284 N. Y. 350, 31 N.E. 2d 188 (1940). The use of this language, in the context of this opinion, may indicate that the Court is moving in the direction of a complete abandonment of the mutuality doctrine.

MATTER OF DALY

(1 N. Y. 2d 100, April 19, 1956)

SPENCER v. CHILDS

(1 N. Y. 2d 103, April 19, 1956)

"I request . . ."

These two cases decided the same day dramatically illustrate the extreme care with which such words must be used in wills. In one (*Matter of Daly*), these words in a will were held not to constitute a testamentary mandate whereas in the other (*Spencer v. Childs*) they were held to constitute an enforceable obligation imposed by the Testator.

In the *Daly* case, the will of a Testatrix provided:

> "In the event that Janet M. Mackey shall serve as Executrix hereunder, I request that she act without compensation."

The will apparently made no such provision with respect to other Executors. The Executrix in question contended that despite this language she was entitled to commissions. The New York County Surrogate's Court held that the Testatrix intended that such Executrix serve without compensation and denied her commissions. The Appellate Division, First Department, found that such language merely denoted a wish or desire, that the will as a whole indicated no contrary intent and accordingly reversed the Surrogate. The Court of Appeals, in a unanimous opinion by Judge Fuld, affirmed the Appellate Division. The Court relied most heavily upon the fact that the language was in precatory form stating:

> "In short . . . the will not only fails to disclose a design on the part of testatrix to deny commissions to respondent, but, considered in its entirety, indicates that testatrix' 'I request' was meant to be precatory, expressive of a wish rather than a command. The will was drafted with care and precision and the probability is that, had a direc-

tion or a proviso been intended, language less dubious and ambiguous would have been used. The thought would, more than likely, have been expressed in terms not of request but of command—she 'shall' act without compensation—or of proviso—'provided' she so act."

In the *Childs* case, the will of the Testatrix provided:

"I request my two children, RICHARD S. CHILDS and MARY CHILDS DRAPER, or the survivor of them, to pay to my sister-in-law, MARY PARKER SPENCER, now residing at Manchester, Connecticut, the sum of Two hundred and eight dollars and thirty-three cents ($208.33) per month as long as she shall live."

Mary Parker Spencer, having failed to receive certain of such payments brought an action in contract to recover arrears. She maintained that in context the verb "request" was a direction to pay to her the sum specified. The Appellate Division, First Department, by a divided court affirmed a judgment in favor of the plaintiff, Mary Parker Spencer, upon a verdict entered in the Supreme Court, New York County. The Court of Appeals affirmed, Van Voorhis, J. dissenting. Judge Fuld also wrote the opinion of the Court in this case.

The Court stated that the intent of the Testatrix in using the words "I request" was to be gathered ". . . not alone from the language and terms of the instrument itself, but also from the conditions and circumstances extrinsic to it." It then pointed to a number of factors influencing its decision: (i) "the degree of clarity and precision employed by the testator in describing the disposition in question—that is, the persons to take, the subject matter or amount of the gift, its terms and duration"; (ii) the fact that the request is addressed to a close relative; (iii) the fact that "the bequest, precatory in tone, precedes the clause disposing of the general or residuary estate out of which the gift is to come"; and (iv) the "size of the estate left by testatrix, her children's great wealth, in contrast to the comparatively small gift of plaintiff, as well as the testatrix's long-continued practice of giving her $208.33 a month, the identical amount mentioned in the will."

Irrespective of the outcome, each of these cases required extensive litigation before the wills could be finally interpreted. Under the circumstances, it behooves the draftsman of a will to use mandatory language unless a binding obligation is clearly not intended; in the latter event the fact that the request is to be no more than a mere request should be made explicit by specific language stating that the testator does not intend by the use of such words to impose any enforceable obligation.

Committee Report

COMMITTEE ON PROFESSIONAL ETHICS

OPINION NO. 815

Question: Two individual lawyers, each with a very active practice in negligence litigation for seamen, have engaged in the practice of making loans to their clients. One of the lawyers has submitted an affidavit listing a large number of retainers by plaintiffs in the calendar year 1955, to 9% of whom he has made loans after the date of the retainer. The other attorney has submitted an affidavit likewise listing a large number of retainers for the year 1955 and loans to 47% of the plaintiffs after the date of the retainer.

The general circumstances in connection with the loans are substantially the same in the case of both of these attorneys. The loans involve, for the most part, three categories: (a) "maintenance loans," (b) traveling and hotel expenses of clients coming from Florida, Texas or other distant points for physical and oral pretrial examinations, and (c) advances after the settlement is agreed upon pending necessary approval of insurance companies, often delayed on account of communication with home offices abroad.

Most of the advances are so-called maintenance advances. The collective bargaining agreements between the ship owners and maritime unions provide for maintenance at the rate of $8 per day, and this is payable whether or not the injured seaman institutes litigation. The shipping companies frequently hold up these payments pending receipt of hospital records and other information, and occasionally refuse to make payments. The lawyers frequently assist in obtaining the necessary papers. In expectation of these payments being made or on assurance of a shipping company that they will be made, the lawyer advances maintenance payments in small installments to the plaintiffs and is reimbursed by the plaintiffs' turning over the maintenance checks when received or out of the proceeds of settlement or judgment. A large percentage of the cases seem to result in settlements. In many of the cases only a few installments of $25 or $50 are advanced, although in one instance as much as $1300 was advanced, which included $600 after a substantial settlement had been agreed upon pending the receipt of approval from London underwriters.

Both of the attorneys emphasize that the advances are made in hardship cases and that their practice is not to stimulate litigation through loans made or promised prior to retainer. The practice of attorneys in this field making loans seems to be a matter of somewhat general knowledge, as one of the attorneys states that on numerous occasions retainers have been lost because of refusal to subsidize seamen during the pendency of litigation. There is always an obligation of the client to repay the loan regardless of whether the plaintiff recovers damages by settlement or otherwise, or whether he receives his maintenance pay.

Opinion: The practice of making such loans under the circumstances described is to be condemned. It is likely to become a matter of general knowledge to unions and others and might tend to induce clients to employ one attorney rather than another, and this very possibility is indicated by the statement of one of the attorneys. See Canon 27 and Opinions of this committee numbers 20, 779 and 781.

Further, the making of such loans would impair the dignity of the profession. See Canon 29.

Although the seaman may be obligated to repay the loans, regardless of whether he recovers damages or receives his maintenance pay, the lawyer's expectation of repayment as a practical matter is based upon such recovery, and his loans would be tantamount to financing the litigation.

We express no opinion on whether this might also constitute a violation of Section 274 of the Penal Law.

May 7, 1956

OPINION NO. 816

Question: A is a member in good standing of the New York and Florida Bars, now actively engaged in practice in the latter state and not in the former. A is retained by B to obtain a divorce against the latter's wife, a resident of New York State. In B's presentation of the facts to A, there appears to be a *prima facie* basis for relief in the Florida courts, both with respect to the matter of residence and grounds and A has no reason to suspect any lack of good faith. The wife, on the other hand, undertakes in the New York courts to stay the Florida action upon the contention that B's residence in Florida is not bona fide. The wife then procures an injunction against B from proceeding and A is likewise enjoined as B's attorney.

Under Florida law, A would be permitted to proceed with B's case and might be under a duty to do so. On the other hand, as a member of the New York Bar, A is concerned with the possibility that in proceeding in the face of the injunction, he may be violating the Code of Ethics applicable to him as a member in good standing of the New York Bar. How would you advise A?

Opinion: If the New York courts had jurisdiction to issue the injunction against the husband and his lawyer, the lawyer should not, as a member of the New York Bar, disregard the injunction.

We express no opinion, however, as to the jurisdiction of the New York courts or as to the validity of the New York injunction.

May 7, 1956

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> The demands made in the name of justice must not be arbitrary or fanciful. They must proceed, not from political or sociological propensities, but from deeper, more ordered, more philosophical and perhaps more enduring conceptions of justice. Impatience at the pace with which legal developments proceed must be restrained because of graver issues. For if the alternative to the judicial administration of the law according to a received technique and by the use of the logical faculties is the abrupt change of conceptions according to personal standards or theories of justice and convenience which the judge sets up, then the Anglo-American system would seem to be placed at risk. The better judges would be set adrift with neither moorings nor chart. The courts would come to exercise an unregulated authority over the fate of men and their affairs which would leave our system undistinguishable from the system which we least admire.
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